A

TEEBAN ARULDAS v. TIMBALAN MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, SHAH ALAM
SM KOMATHY JC
[CRIMINAL APPLICATION NO: 44-188-11-2016]
B 5 JULY 2017

CRIMINAL PROCEDURE: *Habeas corpus – Application – Detention pursuant to s. 6(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 – Applicant made representations to Advisory Board against detention order and requested for copy of*
C *statement recorded by inquiry officer – Request declined by Ministry of Home Affairs – Whether there was indication that applicant's request was referred to Minister of Home Affairs – Whether failure to furnish applicant with copy of statement amounted to procedural non-compliance – Whether respondents could seek privilege and protection from disclosure under s. 14 of Dangerous Drugs (Special Preventive*
D *Measures) Act 1985 and art. 151(3) of Federal Constitution – Whether detention lawful*

The applicant was detained pursuant to a detention order by the Deputy Minister of Home Affairs ('the first respondent') under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The
E applicant made representations to the Advisory Board ('AB') constituted under art. 151(2) of the Federal Constitution ('the FC') against the detention order and for this purpose, requested for a copy of the statement recorded by the inquiry officer. *Vide* a letter, the request was declined by the Ministry of Home Affairs ('the MOHA'), citing national interest and claiming
F privilege and protection from disclosure under s. 14 of the Act and art. 151(3) of the FC ('the letter'). The Yang di-Pertuan Agong, after considering the recommendations made by the AB, affirmed the detention order made by the first respondent. This was an application by the applicant for the issue of a writ of *habeas corpus* for his release from detention on the
G ground, *inter alia*, that the detention was unlawful as there was non-compliance with s. 9(2) of the Act since the letter and the affidavit of one Arbi bin Suhadat ('the affidavit') indicated that the applicant's request for a copy of his statement was referred to Setiausaha Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam Negeri ('SBKKA'). This was
H contrary to the express requirements of s. 9(2) of the Act which required the request to be referred to the Minister of MOHA ('the Minister'). There was no mention in the letter nor the affidavit that the applicant's request for his statement was refused by the Minister. The respondents argued that: (i) the omission was insignificant as the SBKKA would have referred the applicant's request to the Minister; and (ii) the failure to furnish the applicant with a
I copy of his statement did not amount to procedural non-compliance as the respondents had sought privilege and protection from disclosure under s. 14 of the Act and art. 151(3) of the FC.

Held (allowing application):

(1) The failure to provide the applicant with a copy of his statement amounted to a non-compliance with the procedural requirement of s. 9(2) of the Act. The wording in s. 9(2) of the Act is clear and unambiguous that a detainee's request for a copy of his statement to make his representations against his detention order to the AB must be referred to the Minister for his approval. The omission to specifically aver that the applicant's request was referred to the Minister was not insignificant. In the absence of a specific averment in any of the respondents' affidavits that the request was in fact referred to the Minister, it would be reasonable to assume that this was not done and no decision has been made by the Minister to reject it. The applicant ought to have been furnished with a copy of his statement. It was not open to the MOHA to claim protection from disclosure without first referring the request to the Minister as required by s. 9(2) of the Act. (paras 20 & 22)

Case(s) referred to:

Hamsyaini Hamzah v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [2016] 1 LNS 1724 HC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri, Malaysia [2016] MLRHU 1

Rajasakanan Narayanasamy v. Timbalan Menteri Dalam Negri, Malaysia (Permohonan Jenayah 44-82-05-2016) (Unreported)

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), (2)(c), (3), 5(4), 6(1), 9(2), 11C, 14

Federal Constitution, art. 151(2), (3)

For the applicant - KL Chee; M/s KL Chee & Co
For the respondents - Zuraidah; FC

Reported by Najib Tamby

JUDGMENT

SM Komathy JC:

[1] This is an application *vide* originating motion dated 24 November 2016, by Teeban a/l Aruldas for the issue of a writ of *habeas corpus* for his release from detention. He was detained pursuant to an order made by the Deputy Minister of Home Affairs ("Deputy Minister") under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act"). All references in this judgment to sections shall be to the Act unless otherwise indicated.

[2] The background facts, so far as they need to be stated for the purposes of the present application are that the applicant was arrested and remanded by the police to assist investigations under s. 3(1). On 30 May 2016, Inspector Mohd Hafiyzzul Afiq bin Daud completed his investigation report under s. 3(3) and submitted it to the inquiry officer, Jamilah Shuhadah binti Tohet and the first respondent, the Deputy Minister of Home Affairs ("the Deputy Minister").

[3] On 24 June 2016, the inquiry officer conducted an inquiry under s. 5(4), and submitted her report in writing to the Deputy Minister on 24 June 2016.

[4] Relying on Inspector Mohd Hafiyzzul's investigation report under s. 3(3) and the inquiry officer's report under s. 5(4), the Deputy Minister issued an order dated 28 June 2016 under s. 6 directing the applicant's detention at the Rehabilitation Centre in Machang, Kelantan, for a period of two years beginning 28 June 2016.

[5] The order was made pursuant to s. 6(1) which provides:

> (1) Whenever the Minister, after considering:
>
> (a) the complete report of investigation submitted under subsection 3(3); and
>
> (b) the report of the Inquiry Officer submitted under subsection 5(4),
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years.

[6] On 2 July 2016, the applicant made representations to the Advisory Board constituted under art. 151(2) of the Federal Constitution against the detention order. After several adjournments, the applicant's representation was heard on 27 September 2016. On 30 September 2016, the Advisory Board made its recommendations to the Yang di-Pertuan Agong. On 10 October 2016, the Yang di-Pertuan Agong after considering the recommendations of the Advisory Board affirmed the detention order made by the Deputy Minister.

[7] The applicant contends that the detention order is unlawful based on three grounds:

i. there was non-compliance with s. 9(2) of the Act;

ii. there was non-compliance with s. 3(2)(c) of the Act; and

iii. that there were contradictions in the affidavits of the respondents.

The Law

[8] Section 11C of the Act states:

> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> And, section 11D provides that judicial review includes a writ of *habeas corpus*.

[9] It is clear that the only ground on which a detainee can challenge the validity of a detention order is non-compliance with the procedural requirements under the Act for making the order.

[10] The Federal Court in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914, [2004] AMEJ 0130, [2005] 1 MLRA 692, elucidated procedural non-compliance in these words:

> ... the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance.

[11] The Court of Appeal in *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705 held that in an application for *habeas corpus* upon the detainee affirming that his detention was unlawful and wrongful, the burden lies on the detaining authority to satisfy the court that his detention is lawful and in conformity with the mandatory provisions of the Act.

[12] Guided by these principles, I turn to consider the grounds on which this application is premised on.

A **Issue One: Whether There Was Compliance With s. 9(2) Of The Act**

[13] The first ground is based on non-compliance with the procedural requirement of s. 9(2). The section reads:

Representations against detention order

B (1) A copy of every order made by the Minister under subsection 6(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations to an Advisory Board.

(2) For the purpose of enabling a person to make representations under C subsection (1) he shall, at the time of the service on him of the order:

(a) be informed of his right to make representations to an Advisory Board under subsection (1) and

(b) be furnished by the Minister with a statement in writing:

D (i) of the grounds on which the order is made;

(ii) of the allegations of fact on which the order is based; and

(iii) of such other particulars, if any, he may in the opinion of the Minister reasonably require in order to make his representations against the order to the Advisory Board. E

[14] This complaint by the applicant requires a short narrative. The applicant's solicitors had by letter dated 8 August 2016 requested for a copy of the statement recorded by the investigating officer from the applicant to make his representations against his detention order to the Advisory Board. F The request was declined by the Ministry of Home Affairs by letter dated 8 August 2016, signed by one Ernawati binti Amran, citing national interest and claiming privilege and protection from disclosure under s. 14 and art. 151(3) of the Federal Constitution.

[15] Further, in this regard, the Deputy Secretary in the Ministry of Home G Affairs, Arbi bin Suhadat, affirmed an affidavit on 11 January 2017 stating in para. 10:

Merujuk kepada perenggan 33 dan 34 (p) dalam Afidavit Pemohon, saya menafikan dakwaan pemohon. Saya sesungguhnya menegaskan bahawa Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam H Negeri telah merujuk surat peguam bela pemohon bertarikh 08-08-2016 berkenaan dengan permohonan untuk mendapatkan rakaman percakapan pemohon kepada Setiausaha Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam Negeri. Setelah Setiausaha Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam Negeri meneliti dan mengkaji permohonan tersebut, Setiausaha Bahagian I Keselamatan Dan Ketenteraman Awam, Kemeterian Dalam Negeri telah

mengarahkan untuk menolak permohonan tersebut atas alasan rakaman percakapan pemohon adalah dokumen sulit dan pendedahannya adalah bertentangan dengan kepentingan Negara menurut seksyen 14 Akta tersebut dan Perkara 151(3) Perlembagaan Persekutuan. Oleh yang demikian, saya menuntut keistimewaan dan perlindungan di bawah peruntukan undang-undang tersebut. Sesalinan surat balasan bertarikh 09-08-2016 dari Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam Negeri kepada peguam bela pemohon yang telah ditandatangani oleh Puan Ernawati binti Amran, Ketua Penolong Setiausaha, Bahagian Keselamatan Dalam Negeri, Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam Negeri dilampirkan dan ditandakan sebagai "AS-1" dalam Afidavit saya ini. Saya juga menegaskan bahawa penolakan permohonan pemohon tersebut tidak memberi kesan terhadap hak pemohon untuk membuat representasi yang efektif di hadapan ahli-ahli Lembaga Penasihat.

[16] Counsel for the applicant argued that the Ministry's letter dated 8 August 2016 and para. 10 of Arbi bin Suhadat's affidavit indicated that the applicant's request for a copy of his statement was referred to Setiausaha Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam Negeri. This, it was argued, was contrary to the express requirements of s. 9(2), which required the request to be referred to the Minister. Counsel pointed out that there was no mention in the said letter nor the affidavit of Arbi bin Suhadat that the applicant's request for his statement was refused by the Minister.

[17] In response, learned Senior Federal Counsel accepted that s. 9(2) mandated that a detainee's request for a copy of his statement must be referred to the Minister. She also accepted that neither the letter nor the affidavit of Arbi bin Suhadat specifically stated that the applicant's request was referred to and refused by the Minister. The omission was not significant as the Setiausaha Bahagian Keselamatan dan Ketenteraman Awam, Kementerian Dalam Negeri would have referred the applicant's request to the Minister.

[18] In the alternative, she contended that the failure to furnish the applicant with a copy of his statement did not amount to procedural non compliance as the respondents had sought privilege and protection from disclosure under s. 14 and art. 151(3) of the Federal Constitution. In support of this argument, the Senior Federal Counsel cited the two unreported cases of *Hamsyaini Hamzah v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [2016] 1 LNS 1724 and *Rajasakanan a/l Narayanasamy v. Timbalan Menteri Dalam Negeri, Malaysia* (Permohonan Jenayah 44-82-05-2016) where the Federal Court clarified that the failure to furnish a detainee with a copy of his statement did not amount to procedural non-compliance in view of s. 14 and art. 151(3) of the Federal Constitution.

[19] It would be useful if at this juncture for me to set out the material portions of the aforesaid provisions:

Section 14

Nothing in this Part or in any rules or regulations made thereunder shall require the Minister or any member of an Advisory Board or any Inquiry Officer or any public servant to disclose facts or to produce documents which he considers to be against the national interest to disclose or produce.

Article 151

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

(b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[20] I deal now with the contentions of the parties. The wording in s. 9(2) is clear and unambiguous and the Senior Federal Counsel rightly conceded that a detainee's request for a copy of his statement to make his representations against his detention order to the Advisory Board must be referred to the Minister for his approval. I am, however, unable to countenance her contention that the omission to specifically aver that the applicant's request was referred to the Minister is of no significance as in all probability this would have been done. I would add that in the absence of a specific averment in any of the respondents' affidavits that the request was in fact referred to the Minister, it would be reasonable to assume that this was not done and no decision has been made by the Minister to reject it. In the circumstances, I hold that the applicant ought to have been furnished with a copy of his statement. It was not open to the Ministry of Home Affairs to claim protection from disclosure without first referring the request to the Minister as required by s. 9(2).

[21] I turn next to the alternative submission of the Senior Federal Counsel. It bears mention that the two authorities cited by her are not on point and do not assist her proposition that the respondents need not comply with s. 9(2) where protection from disclosure is sought under s. 14 and art. 151(3) of the Federal Constitution. In those cases, the Federal Court was asked to address the question of whether the failure to provide a detainee with a copy of his statement was a breach of art. 151(3) of the Federal Constitution. The issue here is not the same and has to do with whether the Ministry of Home Affairs can claim protection from disclosure of a detainee's request for a copy of his statement without first referring it to the Minister.

[22] I therefore find that the failure to provide the applicant with a copy of his statement amounts to a non-compliance with the procedural requirement of s. 9(2).

[23] The view I have taken on the first issue is sufficient to decide the matter in the applicant's favour. It is therefore not necessary for me to examine the remaining two grounds.

[24] There is one other matter. It is whether the respondents can seek protection from disclosure in respect of a detainee's request for a copy of his own statement to make representations to the Advisory Board. Counsel for the applicant contended that the respondents cannot invoke the protection afforded under s. 14 and art. 151(3) of the Federal Constitution as it was difficult to fathom how disclosure of this statement to the applicant would be contrary to national interest as this was his fundamental right. The applicant needed his statement to enable him to make representations to the Advisory Board which has the power to recommend his release to the Yang di-Pertuan Agong.

[25] There is judicial view in support of this contention. Zulkifli Bakar J in *Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri, Malaysia* [2016] MLRHU 1, expressed the view, by way of *obiter*, that a detainee is entitled to be furnished a copy of his statement upon a proper application and the Minister cannot claim protection from disclosure. The view was endorsed by Madam Justice Suraya Othman in the unreported case of *Hamsyaini bin Hamzah v. Timbalan Menteri Dalam Negeri, Malaysia* [2016] 1 LNS 1724. I would respectfully endorse the view expressed by Justice Zulkifli Bakar and Madam Justice Suraya Othman.

Conclusion

[26] For the reasons given, this application for *habeas corpus* is granted and the detainee is ordered to be set at liberty forthwith.